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NO.

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IN THE

Supreme Court of the United States

October Term, 1983

GARY RAY CARROLL,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether it was error to deny defendant's motion to suppress any and all evidence concerning tracking by a dog considering the fact that the defendant's subpoena of the dog Damian was suppressed and that the trial judge failed to give the jury special cautionary instructions regarding the dog tracking evidence?

II. Whether the United States adduced sufficient evidence to submit the case to the jury under 18 U.S.C. § 2113 (a)?

III. Whether it was error to deny the defendant's motion to suppress statements made to law enforcement officers where such statements were obtained after the defendant was held from four o'clock A.M. until twelve o'clock noon before being taken before a committing magistrate and formally charged, and were otherwise obtained by trickery and under duress?

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The opinion of the District Court for the Eastern District of North Carolina appears as Appendix B, infra, p. 51. The order of the United States Court of Appeals for the Fourth Circuit denying rehearing appears as Appendix C, infra, p. 53. The opinion of the United States Court of Appeals for the Fourth Circuit affirming the District Court is published and appears as Appendix A, infra p. 34.

JURSDICTIONAL STATEMENT

This petition is from a 22 June 1983 affirmance by the United States Court of Appeals for the Fourth Circuit of a conviction in Federal District Court. The Fourth Circuit decision is appended to this petition. Jurisdiction is granted by 28 U.S.C. 1254(1). Petition to rehear was denied on 27 July 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following amendment to the United States Constitution provides in pertinent part:

AMENDMENT VI: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

18 U.S.C. § 2113(a) provides in pertinent part:

. . . Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan

association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny -

Shall be fined not more than $5,000.00 or imprisoned not more than twenty years or both.

18 U.S.C. § 3501(b) provides in pertinent part:

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment . . .

N.C. Gen. Stat. § 15A-501 (2) provides in pertinent part:

Upon the arrest of a person, with or without a warrant . . . a law-enforcement officer: . . . [m]ust, with respect to any person arrested without a warrant . . . take the person arrested before a judicial official without unnecessary delay.

Fed. R. Crim. P. 5(a) provides in pertinent part:

. . . Any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041 . . .

STATEMENT OF THE CASE

GARY RAY CARROLL is the petitioner herein and will be referred to in this petition as "defendant." This appeal arises from defendant's conviction under 18 U.S.C. § 2113(a).

Defendant was convicted of unlawfully attempting to enter a federally insured bank located in Wilmington, North Carolina, with the intent to commit therein a felony theft or larceny. Before his trial, defendant filed a motion to suppress three categories of evidence. After the suppression hearing, an order was entered denying the motion to suppress.

The relevant facts for consideration of the questions presented in this petition begin with the officer's investigation at the bank. The first officer arrived at the bank at about 2:30 A.M. on July 12, 1983. He saw that the night deposit box appeared to be standing slightly ajar and that a small black wire was protruding from the underside of the box. Between 2:30 A.M. and 4:00 A.M. numerous officers were at the scene. Two of these officers discovered two burlap bags and a piece of copper tubing with a treble hook on the end of it approximately 25 to 30 yards into the woods behind the bank. The officers then proceeded another 75 feet further into the woods to continue their search.

At approximately 3:00 A.M. Wilmington police officer Hickman arrived at the scene with his tracking dog, Damian. Officer Hickman took Damian to the night deposit box and gave him the "finding sign." The dog then led him into the woods and stopped at the burlap bags. Four other officers followed Hickman and Damian further into the woods to a dense thicket where Damian indicated in the

opinion of the officer that there were at least two subjects who went in opposite directions at that point. At that time Damian was called off the track and did not return to the scene until some 29 hours later.

In the meantime, at approximately 3:30 A.M., defendant Carroll walked up to a Sheriff's Department car deployed in the general area of the bank. Defendant explained his presence in the area to the deputy, who did not believe his statement and placed him in custody.

Thereafter, Officer Hickman and his dog were called to the deputy's car, but the dog remained in Officer Hickman's truck. Mr. Carroll was subsequently taken to the holding room of the Wilmington Police Department. At approximately 4:00 A.M. Wilmington Police Detective Lesher arrived at the holding cell and remained there with Mr. Carroll until noon of that day. Mr. Carroll slept for some amount of time between 4:00 A.M. and 8:00 A.M. on the backless wooden bench in the holding cell.

At approximately 8:00 A.M. Mr. Carroll was interviewed by Wilmington Police Detective Lesher and F.B.I. Agent Willis. Mr. Carroll told the officers that he had come to Wilmington from Virginia Beach with two acquaintances and repeated his earlier statement that several hours after separating from his friends, two men had grabed him as he walked along a road and had thrown him into a ditch in the woods behind the bank and had struck at him. At one point Officer Harris of the Wilmington Police Department went into the interview room and asked Mr. Carroll to hold his foot up so Harris could look at his shoe. Mr. Carroll then stated, "You found my prints there?" After being told by the officers that there were several similar bank robberies under investigation, the defendant stated that the the same people were not responsible for all of the burglaries. Later, the defendant under close questioning stated that he could not discuss the bank break-ins because he feared for his personal safety and that he had lied about who accompanied him to Wilmington.

On July 14, 1983 the defendant was brought from his cell to have prints taken by Officer Harris. The defendant asked Officer Harris why he always smiled when he looked at the defendant's prints, and Officer Harris replied that he couldn't discuss the case. Harris then told the defendant that the police had found footprints and fingerprints at the bank scene. The defendant stated that he wasn't at the bank alone and the officer told him to discuss it with the investigating officers.

On July 13th, 1983, some 29 hours after the initial bank alarm, Officer Hickman and his dog, Damian, went with another officer back to the bank scene. Hickman let Damian sniff trousers taken from the defendant and gave the "find" command. Damian went into the woods to the area where the bags had been, to the thicket where he stopped the night before and then went to the right towards South College Road. Officer Hickman did not continue to follow the trail through the woods. Rather, he took the dog to South College Road and walked the dog along the tree-line until the dog again alerted.

Officer Hickman did not follow the track from the road back to the bank.

No fingerprints or footprints identified as those of being the defendant were found at the scene.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I. CERTIORARI SHOULD BE GRANTED TO ALLOW THIS HONORABLE COURT TO SPEAK ON IMPORTANT ISSUES SURROUNDING THE INTRODUCTION OF DOG TRACKING EVIDENCE AT CRIMINAL TRIALS. HERE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

There are few federal cases that have spoken to this issue and this is a case of first impression for this Honorable Court. Considering the severity of the sentence imposed, 20 years, on this defendant, this question presents more than a desire to satisfy scholarly interest. It involves resolution of an important issue with important consequences. In this case the dog tracking evidence was the strongest evidence against the defendant. The denial of his due process right to face

his accuser, the introduction of evidence without a clear definition of what foundation was required, and the failure to give the jury special cautionary instructions, all led to a substantial deprivation of his freedom. This Court should clear up the mysteries surroundings proper use of dog evidence, especially where the results of the use of such evidence have the great impact on the outcome of a trial that they have in the case sub judice.

With the presentation of this issue to the Court, defendant offers a unique opportunity to speak on an important issue. Evidence such as this, provided by tracking dogs, requires interpretation. The tracking dogs are unable to verbalize their testimony so, their actions must be explained and interpreted by their handlers. When evidence requires interpretation, the government should be held to strict standards in meeting the burden required for admissibility. Since the Supreme Court has never addressed the particular issues raised here, it has a grand opportunity to do so with this case. This case presents many questions not yet answered by the Supreme Court on evidence

provided by dogs. These questions are in three basic categories. They are:

1. The foundation required to admit evidence of an alleged tracking by a dog. This category includes questions on whether or not a particular breed of dog has acute scenting skills, what prior prowess must be shown, the proper way to put a dog on the trial of a suspect, and how little or how much is required to contaminate the trail.

2. Whether or not the confrontation clause of the Sixth Amendment requires that the dog be brought into the courtroom so that the fact finders can evaluate his demeanor and judge for themselves whether such an accuser is worthy of belief.

3. Whether or not the lower court has a duty to caution the jury specifically regarding the manner in which they should view evidence relating to an alleged dog tracking.

As to the first issue, the foundation required to admit evidence, there are few Federal cases on the subject. The general rule among the various jurisdictions is that evidence of tracking by a dog is admissible in a crminal prosecution upon

the establishment of a proper foundation for corroborative purposes. U.S. v. Gates, 680 F.2d 1117 (6th Cir. 1982) (per curiam); U. S. v. Joyner, 492 F.2d 650 (D.C. Cir.), cert. denied, 419 U.S. 852 (1974); Rumfelt v. U. S., 445 F.2d 134 (7th Cir.), cert. denied, 404 U.S. 853 (1971). See generally, Annot. 18 A.L.R. 3rd 1221 (1968). In the case at issue, several of the elements necessary to establish a proper foundation were missing and a few others were highly questionable in substance.

Secondly, upon defendant's application, subpoena was issued to the dog "Damian" which commanded his appearance at the trial of this case. This subpoena was suppressed at trial. Defendant contends that the suppression of the subpoena constituted error of constitutional dimension since the Sixth Amendment of the United States Constitution provides in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him . . ." The United States Supreme Court has long recognized that this constitutional privilege is comprised of

two major components: (1) the right to have one's accuser stand face to face before the jury so that they may actually look upon him, evaluate his demeanor and judge for themselves whether such accuser is worthy of belief; and (2) the right to conduct effective cross-examination of one's accuser. Maddox v. U.S., 156 U.S. 237, 242 - 44 (1895).

By the issuance of this subpoena, defendant sought to enforce the constitutional preference for face to face accusation, which is a literal right forming the core of the confrontation clause and one which is essential to a fundamentally fair trial. See, California v. Green, 399 U.S. 149, 157 (1970); Barber v. Page, 390 U.S. 719, 721 (1968). The right to cross-examine the dog's handler, Officer Hickman, should not suffice as confrontation of one's accuser is necessary to satisfy the constitutional mandate of the Sixth Amendment.

Finally, it is important to note that the majority of appellate decisions upholding the admissibility of such evidence have emphasized the corresponding

fact that the jury was, in each instance, properly admonished regarding the corroborative nature of the evidence, the caution with which it should be viewed, and the limited weight it should be afforded. See, e.g., U.S. v. Gates, 680 F.2d 1117 (6th Cir. 1982) (per curiam); People v. McPherson, 85 Mich. App. 341, 271 N.W.2d 228 (1978); State v. Taylor, 118 N.H. 855, 395 A.2d 505 (1978); See, Annot., 94 A.L.R. 413, 427 (1935).

The receipt of this type of evidence by the jury is particularly dangerous in that the jury may unintentionally place "too great" or exaggerated importance upon its meaning, to the jeopardy of a free citizen, and any court allowing its admission should be alert to guard against that danger. See, Brott v. State, 70 Neb. 395, 97 N.W. 593 (1903); State v. Moore, 129 N.C. 494, 39 S.E. 626 (1901). The trial Court had an affirmative duty to instruct the jury with respect to the weight, etc., to be given dog tracking evidence.

These points are all especially important in this case because the dog evidence was the strongest evidence against the defendant. The other evidence

was generally of a sparce and weak nature. All jurisdictions allowing the admission of dog evidence requires corroboration by other substantial evidence supporting conviction, preferably human testimony and identification. People v. McPherson, 85 Mich. App. 241, 271 N.W.2d 228 (1978), and authorities cited therein.

Based upon the foregoing, the defendant contends that this Honorable Court should review this important issue of evidence related to the use of a dog to attempt to identify a person and that on such review the Court would find that the dog evidence should have been suppressed because it totally lacked any probative value under the circumstances and created an impermissable and constitutionally unbearable risk of misidentification by the dog. See, e.g., State v. McLeod, 196 N.C. 542, 146 S.E. 409 (1929).

II. THE DECISION OF THE FOURTH CIRCUIT IN THE CASE UNDER CONSIDERATION THAT THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE DEFENDANT ATTEMPTED TO ROB THE BANK IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH, SIXTH, AND EIGHTH CIRCUITS ON THE SAME SUBJECT MATTER.

The Fifth Circuit has held that mere presence plus guilty knowledge is not

sufficient to support an individual's conviction of bank robbery. Thomas v. U.S., 398 F.2d 531 (5th Cir. 1967); Pinkney v. U.S., 380 F.2d 882 (5th Cir. 1967).

The Fourth Circuit's decision in this case is also in conflict with the Eighth Circuit. That court held that it was insufficient evidence for an armed robbery conviction where defendant possessed money taken in a robbery. The court stated that more would be required to sustain a robbery conviction. United States v. Jones, 418 F.2d 818 (8th Cir. 1969). In the instant case, like that case, there was no direct evidence linking the defendant to the crime.

While the Fourth Circuit Court of Appeals felt that sufficient evidence connected this defendant with the attempt "to enter a federally insured bank with the intent to commit a felony therein," the evidence only tended to link the defendant to the area of the scene of the crime. Such evidentiary matters did not, however, link the defendant to active participation in the crime itself. It must be shown by the government that the defendant was a participant in the crime,

and not merely a knowing spectator. U.S. v. Winston, 687 F.2d 832 (6th Cir. 1982).

Applying the foregoing legal principles to the facts of the present case leads inescapably to the conclusion that the evidence provided by the government was not sufficient to establish beyond a reasonable doubt that the defedant actively participated in the attempt to enter the bank. Rather, it tended only to show the defendant's presence in the area of the crime scene and that he possibly possessed some guilty knowledge with respect to the occurrence of the criminal events. There was no evidence (such as fingerprints) linking defendant to the instrumentalities of the crime that were discovered in the woods, nor did the police find on the person of the defendant any evidence (such as tools) which might have been used during the crime. The defendant's admissions to the police referred to the participation of others in the crime, but at no time did the defendant say that he was personally involved in the crime.

Finally, there was simply no substantial, positive evidence, such as

fingerprints, footprints, fibers, or human identification, which connected defendant to the crime or its instrumentalities or which would have supported a reasonable belief that the defendant had engaged in active participation in any crime. See, U.S. v. Gandolfo, 577 F.2d 955 (5th Cir. 1978), cert. denied, 441 U.S. 933 (1979); U.S. v. Corso, 439 F.2d 956 (4th Cir. 1971) (per curiam).

When taking away freedom and the right to liberty, the government needs to be held to strict standards in meeting the burden necessary to sustain a conviction. These cases have been decided too much on an ad hoc basis. The Supreme Court can help correct this problem by addressing the issues here. This case provides an ideal situation for the Court to provide a more definitive statement as to how much more is needed beyond mere presence in the area of a crime for a conviction to stand.

III. WITH THE DECISION OF THE FOURTH CIRCUIT IN THE CASE UNDER CONSIDERATION THAT THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE DEFENDANT ATTEMPTED TO ROB THE BANK, THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Although it has been held that an attempt to enter the night depository box of a federally insured bank is an attempt to enter that bank within the meaning of 18 U.S.C. § 2113(a), U.S. v. Lankford, 573 F.2d 1051 (8th Cir. 1978), there is apparently little or no authority defining what constitutes a substantial step toward attempting an entry into such a depository so as to sustain a conviction under the statute. This case offers a unique opportunity for this Court to narrow the definition of what constitutes a substantial step.

Defendant argues that the circumstantial evidence presented in this case does not support a conclusion that someone took a substantial step toward the fulfillment of a fixed criminal design in connection with this bank. Compare, Rumfelt v. U.S., 445 F.2d 134 (7th Cir.), cert. denied, 404 U.S. 853 (1971). Rather, it is more likely that someone had indeed prepared to commit the crime of

entering the bank but had nonetheless voluntarily abandoned the plan prior to performing sufficient overt acts to justify the imposition of criminal sanctions. U.S. v. Jackson, 560 F.2d 112 (2nd Cir.), cert. denied, 434 U.S. 941 (1977).

As has been previously discussed, the major evidence presented to incriminate this defendant in the alleged attempted bank robbery related to alleged dog tracking. Defendant argued that such evidence should have been suppressed, yet, irrespective of the court's decision on that issue, defendant still contends that the government's case was patently insufficient to prove his guilt of the charge (whether the dog evidence is found to be admissible or inadmissible). This is so because the dog evidence could not support a conviction by itself, and there is simply little if anything else to corroborate the supposed import of that evidence to the degree that it could be reasonably said that the government presented substantial evidence of defendant's guilt upon each and every element of the crime of attempted bankrobbery. See, e.g. State v. Norman,

153 N.C. 591, 68 S.E. 917 (1910); State v. Lanier, 50 N.C. App. 383, 273 S.E.2d 746, discretionary review denied, 302 N.C. 632, 280 S.E.2d 445 (1981); State v. Marze, 22 N.C. App. 628, 207 S.E.2d 359 (1974).

IV. THE DECISION OF THE FOURTH CIRCUIT IN THE CASE UNDER CONSIDERATION HOLDING THAT IT WAS NOT ERROR TO DENY SUPPRESSION OF DEFENDANT'S STATEMENTS TO OFFICERS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS HONORABLE COURT AND WITH OTHER DECISIONS IN THE FOURTH CIRCUIT. IT ALSO GIVES THIS COURT AN OPPORTUNITY TO SPEAK ON AN IMPORTANT ISSUE THAT HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

A confession is involuntary and subject to suppression when it is induced by such duress or coercion, either expressed or implied, that the accused's "will has been overborne and his capacity for self determination critically impaired." Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973); U.S. v. Wertz, 625 F.2d 1128 (4th Cir. 1980).

The government bears a heavy burden of proof in establishing that a defendant's waiver of his constitutional right to counsel and to remain silent was in fact

informed and volitional. Such a waiver must be shown by a preponderance of the evidence, and that evidence must be clear and convincing. United States v. Grant, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); United States v. Wyatt, 561 F.2d 1388 (4th Cir. 1977). The defendant asserts that, using the totality of the circumstances test, the government failed to meet its burden of proof.

Defendant's waiver could not be informed and volitional where he was held for eight hours in a small room with two backless benches while he was wet, dirty, sweaty, unfed, cut, and scratched and where defendant was not taken before a committing magistrate from the time of his arrest at approximately 3:00 o'clock A.M. until the officers had completed their interrogation at 12:00 o'clock noon.

Under both Federal and North Carolina state law, police officers are required to take a person arrested without a warrant before a magistrate without unnecessary delay. Rule 5(a), Fed. R. Crim. Pro.; 18 U.S.C. § 3501(b); N.C. Gen. Stat. § 15A-501(2). The defendant is aware that Rule 5(a) is not applicable to arrests by state authorities unless it is shown that

state and federal officers worked together with the intent to delay arraignment until a confession could be obtained. Ralph v. Peppersack, 335 F.2d 128 (4th Cir. 1964), cert. denied, 380 U.S. 925 (1965). Nonetheless, the compelling facts of this case should certainly give this Court pause.

The presentation of the important issue above offers this Honorable Court an opportunity to speak. The Court has an opportunity to define what are appropriate measures to be taken to safeguard a defendant's rights.

The defendant also made certain statements in the nature of admissions to Officer Harris, the Wilmington Police Department Identification Officer. These statements were made following a fingerprinting session. Officer Harris kept smiling while taking the defendant's prints. When asked why, he told the defendant that he could not discuss the case, but volunteered that the police had found fingerprints at the scene. (If, in fact, fingerprints were taken at the scene, they were not those of the defendant.) The obvious implication of this combination of behavior and comment,

from the defendant's point of view, was that the defendant's prints appeared to match prints from the bank. While statements made by the defendant to Officer Harris were clearly not made in response to express questioning, they were nonetheless subject to suppression under the Doctrine of Rhode Island v. Innis, 446 U.S. 291 (1970). By not following this doctrine, the Fourth Circuit Court of Appeals failed to follow principles of law already spoken to by the United States Supreme Court.

In the Innis case, the Supreme Court adopted a two pro ig standard for defining custodial interrogation:

> The Miranda standards come into play whenever a person in custody is subject to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. 446 U.S. at 300 to 301 (emphasis added; footnotes omitted.)

The words and actions of Officer Harris in the case at bar constitute psychological trickery and were such as to require Miranda warnings, which Officer Harris did not give. In contrast to Innis, in the instant case, the police knew that their action and comments were reasonably likely to elicit an incriminating response. In fact, their actions were probably calculated to bring about just such a response.

Thus, from the foregoing, it is evident that the Fourth Circuit's opinion in the instant case is in conflict with the applicable principles previously decided by the Supreme Court in Rhode Island v. Innis. Defendant's waiver of his rights could not be informed and volitional when induced by trickery.

C O N C L U S I O N

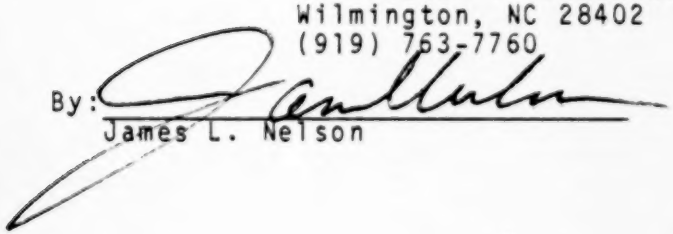
Considering the novelness of the issues presented by the use of dog tracking evidence, and the conflicts between the Fourth Circuit and other circuits and the Fourt Circuit's failure to follow applicable principles previously decided by the Supreme Court on the other

issues presented, the case is ripe for review by the Honorable United States Supreme Court.

Petitioner therefore, respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit and that a Stay of Mandate shall issue to the Fourth Circuit Court of Appeals pending final determination of the Writ.

Respectfully submitted.

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THE APPENDIX

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Published Opinion of the United States Fourth Circuit Court of Appeals, June 22, 1983.

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Final Order in the United States District Court for the Eastern District of North Carolina.

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Order denying rehearding in the United States Court of Appeals for the Fourth Circuit, July 27, 1983.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5301

United States of America, Appellee,
v.
Gary Ray Carroll, Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina. W. Earl Britt, District Judge.

Argued: April 15, 1983
Decided: June 22, 1983

Before RUSSELL and ERVIN, Circuit Judges and KELLAM,* Senior District Judge.

James L. Nelson (Nelson, Smith & Hall on brief); Mary E. Lee (Nelson, Smith & Hall; Barbara Ann Smith, Purser, Cheshire, Manning & Parker on brief) for Appellant; Margaret I. Miller, Dept. of Justice (Samuel T. Currin, United States Attorney on brief) for Appellee.

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*Honorable Richard B. Kellam, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

ERVIN, Circuit Judge:

This is an appeal by Gary Ray Carroll from his conviction following a jury trial in the United States District Court for the Eastern District of North Carolina for attempting to enter a federally insured bank with intent to commit a felony therein in violation of 18 U.S.C. § 2113(a). Finding no merit in any of his assignments of error, we affirm.

I.

At about 2:30 A.M. on July 12, 1982, police responded to a silent alarm set off at a Wilmington, North Carolina, branch of the First National Bank. When the police arrived at the bank, they noticed that the night deposit box was open and that a small black wire was protruding from the bottom of the box. Officer Kidd pulled on the box handle and the box opened. The box ordinarily cannot be opened without a key and the key cannot be removed from the bank's lock until the box is closed and relocked. There was no key in the lock. The protruding black wire led to the box's alarm. A bank employee in charge of security devices testified that someone attempted to cut the wire, but shorted it and set off the alarm. That employee also

testified that when he arrived at work on the morning of the twelfth, he saw some scratches around the box's lock and that the box appeared to have been pried open.

The police discovered some freshly made footprints near the bank and followed them into the woods. Officer Kidd was one of the officers who followed the path. After about thirty yards, the officers discovered two burlap bags and a piece of copper tubing with a treble hook attached to one end. The police also heard a noise in the woods made by a large animal or person "running through the brush." A bank employee testified that the copper tubing with the attached treble hook could have been used to pull out deposit bags in the vault connected to the night deposit box. The bank had been robbed before in that manner. A later search of the area turned up two crowbars and a flashlight.

At 3:00 A.M., Officer Hickman, a trained dog handler, arrived at the bank. Officer Hickman instructed his tracking dog, Damian, to smell the night deposit box and to track the individual whose scent he smelled on the box. Damian led Hickman to the path leading into the woods and to the location of the two burlap bags

and copper tubing. From there, Damian proceeded deeper into the woods to a dense thicket. Damian then indicated that there were at least two suspects who had gone in opposite directions. Hickman and Damian then went a few yards further and the dog indicated that he could smell a suspect nearby. Hickman then halted the search under instructions received over his police radio to go to a nearby parking lot where Carroll was being detained.

At 3:30 A.M., Carroll approached a sheriff's car that was parked along College Road, about one-quarter mile south of the bank. Carroll had scratches on his face, neck, and hands. His feet and pants below the knees were wet and muddy. Carroll told a deputy sheriff that two men had just attacked him and thrown him into a ditch. The deputy sheriff took Carroll into custody, advised him of his rights, and placed him in the back of the patrol car. Hickman arrived and took Damian to the area where Carroll said the attack had occurred. Damian made no response.

Carroll was taken to the Wilmington Police Station and put into the holding cell, a small room with two backless

wooden benches. Detective Lesher stayed with Carroll in the cell from 4:00 A.M. until noon. Carroll slept on a wooden bench from 4:00 A.M. until 8:00 A.M.

At 8:00 A.M., Detective Lesher and F.B.I. Agent Willis began a joint interview of Carroll. Both read him his rights and obtained his signature on waiver of rights forms. Carroll related the following events. He said he lived in Virginia Beach, Virginia, and had driven to Wilmington the previous evening with his two brothers in their automobile. The three arrived in Wilmington around 6:30 P.M., and went to a McDonald's restaurant. Carroll's brothers met two girls there and went to the movies with them. Carroll was to meet his brothers later that evening at the Days Inn Motel. Carroll left McDonald's at about 9:00 P.M. and walked around for an hour until he came across his brothers' car parked behind the New Center Cinema. He then walked around the area for another hour, and at 11:30 P.M. returned to the parking lot, only to discover that his brothers' car was gone. He then walked up New Center Drive toward College Road intending to go to Hardee's restaurant to look for his brothers. As

he was walking down College Road, two men whom he did not recognize, jumped out of a drainage ditch, beat him, and pushed him down into the ditch. Carroll climbed out of the ditch and ran toward Hardee's, whereupon he ran into the deputy sheriff. Carroll denied that he had attempted to rob the bank or that he had been near the bank.

Officer Lesher and Agent Willis told Carroll that they did not believe him and point out certain implausibilities in the statement. Lesher and Willis went in and out of the holding room during the questioning. At one point, Officer Harris of the Wilmington police entered the holding room and checked Carroll's shoe print. Carroll remarked to Harris "you found my prints there." After being told that there had been similar robberies, Carroll stated that the same people were not responsible for all the robberies. Carroll said he had been involved with the "wrong crowd" and that he was not the only person involved in the attempted bank robbery. When asked to elaborate, Carroll refused, saying he feared for his safety. He also admitted that he had not come to

Wilmington with his brothers, but refused to tell with whom he had come.

The interrogation concluded at approximately 12:00 noon and Carroll was taken before a state magistrate and formally charged. Officer Harris then took Carroll's fingerprints. Carroll asked Harris why he smiled when he looked at Carroll's prints. Harris replied that he could not discuss the case and that he always smiled. Carroll then asked Harris about his case and said he knew he did not have much of a chance. Harris allowed that the police had discovered some footprints and fingerprints near the bank. Carroll then told Harris that there had been others with him near the bank.

On the morning of July 13, Officer Hickman and Damian returned to the bank. Hickman let Damian smell Carroll's confiscated trousers and instructed Damian to search the scent. Damian led Hickman into the woods past the spot where the bags and copper tube were found and, at the point where the dog previously had indicated that the trail had split, followed the trail to the right. Damian then indicated that the trail turned back toward College Road. Hickman did not

follow the trail through the woods but took Damian to the area where the deputy sheriff had been parked and Damian indicated that Carroll had exited the woods near where he had approached the deputy's car. Hickman did not follow the trail from the exit point back through the woods to the bank.

None of the footprints found at the scene were later identified as Carroll's. However, soil samples taken from Carroll's clothes matched the soil behind the bank.

On August 17, 1982, Carroll was indicted by a federal grand jury for unlawfully attempting to enter a federally insured bank with the intent to commit a felony therein. Carroll thereafter filed a motion to suppress the statements he had made and any evidence relating to the tracking made by Damian. By order dated October 15, 1982, the motion was denied. On October 27, 1982, the jury returned a verdict of guilty and the district judge sentenced Carroll to twenty years imprisonment. This appeal followed.

II.

On appeal, Carroll makes three assignments of error: (1) his statements to Lesher and Harris should have been

suppressed; (2) the evidence relating to the tracking dog should have been suppressed; and (3) the guilty verdict is not supported by sufficient evidence. We cannot agree.

A.

Carroll claims that it was error not to suppress the statements he made to Officers Lesher and Harris. He argues that the statements were made under duress, that there was an impermissible delay between his arrest and the time he was brought before a magistrate, and that he was tricked by Harris into making a statement.

Whether an admission is voluntary or induced by duress or coercion is to be determined from the totality of circumstances, including the setting in which the statement was obtained, the details of the interrogation, and the characteristics of the accoused (i.e., his age, education, experience, and intelligence). Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); United States v. Wertz, 625 F.2d 1128, 1133-34 (4th Cir.), cert. denied, 499 U.S. 904 (1980). The circumstances cited by Carroll are his lack of sleep, the denial of medical care,

the denial of food, and the intimidating atmosphere of the stark holding cell. Those circumstances do not warrant a finding of involuntariness.

Carroll was able to sleep for several hours and was questioned for only four hours. He was not beaten or threatened. Although he suffered scratches on his skin, those scratches were superficial and there is no evidence that he requested or was denied food, water, or use of the toilet. Carroll was 26 years old. He had completed the eleventh grade and could read and write. Furthermore, he was advised of his rights on three occasions by three different officers and had signed two written waiver forms.

Carroll suggests that there was an impermissible delay between the time of his arrest (3:30 A.M.) and the time he was brought before the magistrate (12:00 noon). He concedes, however, that Fed. R. Crim. Pro. 5(e) is not applicable to his state arrest. Furthermore, there is no evidence that the delay was pursuant to a working arrangement between state and federal authorities designed to thwart the rule. See United States v. Torres, 663 F.2d 1019, 1024 (10th Cir.), cert. denied,

____ U.S. _____, 102 S.Ct. 2237 (1982). Carroll nevertheless contends that the delay evidences the lack of appropriate safeguards for his rights. While the delay was unfortunate, it does not, when viewed in light of the totality of the circumstances, require a finding of involuntariness.

Carroll's claim that Officer Harris tricked him into making incriminating remarks is not supported by the evidence. That Harris smiled when he looked at Carroll's prints does not make Harris's "words or actions" the "functional equivalent" of an "interrogation" under Miranda v. Arizona, 384 U.S. 436 (1966). See Rhode Island v. Innis, 446 U.S. 291, 301 (1980). In fact, Harris explained to Carroll that he always smiled a lot and told Carroll that he could not discuss the case with him. Only after Carroll continued to question Harris did Harris allow that the police had found some -- but not specifically Carroll's -- footprints near the bank. It was at that point that Carroll volunteered that others had been with him near the bank. That statement cannot be viewed as the product of a Miranda interrogation.

B.

Carroll next argues that the evidence relating to the tracking by Officer Hickman and the dog, Damian, should not have been admitted because the prosecution did not establish a proper foundation. Carroll contends that the evidence was unreliable because Damian did not have a sufficiently successful tracking record, the trail Damian followed had been contaminated by police, Damian never followed the complete trail, and Hickman did not allow Damian to smell Carroll when he was taken into custody by the deputy sheriff.

Officer Hickman testified that he and Damian successfully had completed a 10-day detection and tracking training course, that he and Damian practiced tracking at least three times a week, that he and Damian previously had worked on about 17 to 25 cases, and that Damian successfully had tracked objects and people on hundreds of prior occasions in training sessions

and in actual police work. That testimony established a proper foundation for the evidence.[1]

Furthermore, there were sufficient indicia of reliability regarding the

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[1]Carroll has argued that it was error for the district court to quash his subpoena of Damian. Carroll sought "to put the dog on the stand" and "to try to talk to the dog" so that "the jury personally could view the dog and judge its appearance for signs of intelligence, training and good breeding." Carroll claims that he was denied his sixth amendment right of confrontation. This claim has been rejected by the courts on the basis that the witness is not the dog, but rather the handler. See, e.g., State v. Barger, 612 S.W.2d 485 (Tenn. Crim. App. 1980). Carroll nevertheless argues that some worthwhile purpose could have been served by having the dog present in the courtroom for evaluation by the jury and, perhaps, for testing in front of the jury. The dog's reliability, however, adequately was attested by requiring its handler, Hickman, to establish a foundation for his testimony. Where, as here, the handler testifies that the dog successfully has completed a training course, practices several times a week, and successfully has completed hundreds of tracking exercises, no purpose is served by having the dog appear before the jury to perform a set of tests.

particular trackings here. Hickman testified that conditions surrounding Damian's tracking on the morning of July 13, the day after the attempted robbery, were favorable; that when the air and ground warm up in the morning all scents follow the rising warm air currents, making a trail easy to follow. For the July 13 search, Damian scented only Carroll's trousers so it could not be that he was following the scent of an officer who had walked the trail before. Furthermore, Damian went further into the woods than had Officer Kidd, the only one who could have contaminated the previous morning's tracking by virtue of having touched the box that Damian scented. It is notable that Damian followed the same trail he tracked the previous morning, except as one would expect, that he broke only in one direction at the point where he previously had indicated that the suspects had split up.

While the tracking evidence would have been more convincing if Hickman had let Damian track the complete trail, that failure does not make the evidence inadmissible. The trail was tracked to a point where it turned toward College Road

and Damian indicated that he detected Carroll's scent at the edge of the woods near the area on College Road where Carroll approached the deputy's car.

It is also significant that Carroll had the opportunity to cross-examine Hickman and to argue to the jury the points he now raises concerning the probativeness of Hickman's testimony. Once an adequate foundation was established and the threshold of reasonable reliability passed, admission of that testimony was proper and it was sufficient for Carroll to have the opportunity to attack the testimony's probativeness.[2]

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[2]Carroll also argues that the district court erred by failing to warn the jury not to give undue weight to the dog tracking evidence. Carroll claims that the district court should have given the instruction, sua sponte, when the jury requested the transcript of the tracking evidence. Because Carroll failed to request such an instruction, however, he has waived his objection to its omission, absent plain error. See Red.R.Civ.Pro. 52(b); United States v. McCaskill, 676 F.2d 995 (4th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 381 (1982). While such an instruction clearly would have been appropriate, neither this court nor any other court has ever held

C.

In reviewing the evidence, this Court must examine the evidence in light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80 (1942). So viewed, the evidence was sufficient to establish that Carroll attempted to rob the bank, i.e., took a "substantial step" toward commission of the offense. See United States v. Manley, 632 F.2d 978, 987 (2d Cir.), cert. denied, 449 U.S. 1112 (1980).

Footnote 2 continued:
that the failure to give such instruction is plain error. See Barger, 612 S.W. 2d at 493 (not plain error to fail to give warning instruction concerning dog tracking evidence). Furthermore, the jury was instructed to consider all the evidence in the case and to give the expert testimony only such weight it deemed it to deserve. Carroll cross-examined Hickman and in his closing arguments to the jury attacked the probative value of the tracking evidence. Considering the jury instructions as a whole and Carroll's attack on the evidence, it was not plain error not to instruct the jury about giving undue weight to the tracking evidence.

The evidence showed that the robbers forced open the lock to the night deposit box, fished out a wire connected to the bank's alarm system, and attempted to cut the wire in order to silence the alarm. The robbers had with them tools to remove deposits from the vault. The robbers did not voluntarily give up the crime; they fled into the woods upon hearing the police, who were tipped by the silent alarm. In their haste, the robbers dropped the implements of the crime. Indeed, the first officer to search the woods heard one of the robbers running through the brush. The evidence establishes a substantial step toward the commission of the offense.

Sufficient evidence connects Carroll with the attempt. The dog tracked Carroll into the woods from the bank past the point where the implements were dropped and back toward College Road, where Carroll approached the deputy. Soil samples taken from Carroll's clothes matched the soil behind the bank. Carroll had scratches that indicated he had run through a thicket. His story was implausible since he said he began to walk toward Hardee's at 11:30 P.M., but

approached the police car, which was only one-half mile from his starting point, at 3:30 A.M. It should not have taken Carroll four hours to walk one-half mile. Carroll told an officer that he was involved with the wrong crowd and that others had been involved in the attempt. This evidence is sufficient to establish Carroll's involvement in the attempted robbery.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
THE EASTERN DISTRICT OF NORTH CAROLINA
DOCKET NO. 82-25-01-CR-7

UNITED STATES OF AMERICA

vs.

GARY RAY CARROLL,

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date at New Bern, N. C., October 27, 1982, with counsel James L. Nelson and Carlton S. Prickett, Jr., - private and pled not guilty. There being a verdict of guilty, by a jury. Defendant has been convicted as charged of the offense of bank burglary, in violation of the provisions of Title 18, U.S.C., Section 2113(a), as charged.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the

defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty (20) years.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occuring during the probation period.

Defendant is allowed to go under existing bond, with additional restrictions as set out in order filed this date.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

Signed, W. Earl Britt, U. S. District Judge, October 27, 1982.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 82-5301

UNITED STATES OF AMERICA

Appellee,

vs.

GARY RAY CARROLL,

Appellant.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Ervin for a panel consisting of Judge Russell, Judge Ervin, and Judge Kellam (U.S.D.J.).

For the Court,

Signed William K. Slate, II, Clerk
Filed: July 27, 1983